

No. 21180

In the

# United States Court of Appeals

*For the Ninth Circuit*

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C. H. LEAVELL & COMPANY, a Texas corporation, and RIVER CONSTRUCTION CORPORATION, a Delaware corporation, a Joint Venture, and ALLISON STEEL MANUFACTURING CO., an Arizona corporation,

*Appellants,*

vs.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

*Appellee.*

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## Petition for Rehearing

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## Petition for Rehearing

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Appellee respectfully requests that the Court grant rehearing in the above captioned matter on the following grounds:

1. This court has overlooked or has erroneously interpreted the findings and conclusions of the trial judge concerning the nature of the actions by Allison's employees which resulted in the loss, and has thereby characterized the intentional alteration and change in the general method of construction as being a mere act of negligence on the part of Allison's employees. The Court's attention is respectfully directed to Finding of Fact No. 15 (T.R. 37), the most important portion of which was omitted from the opinion:

"15. Why the workmen did not follow the proper procedures and use the proper method in attempting to position this wind boom cable has not been established. *Either these workmen had not reviewed the required erection procedures in this instance or 'took a chance' thereby avoiding the extra work required in going to the top of the tower, disengaging the block and tackle from the top of the derrick and re-attaching it to the corner of the tower at the top of the tower.*" (Emphasis added to indicate portions omitted from opinion)

Based upon the foregoing Finding of Fact, the trial court correctly concluded as follows:

"The Court is of the view that this loss occurred during a period of time when the policy was not in effect because the use to which the derrick was put to lift the wind boom cables constituted a material alteration or change in the method of construction. It was agreed by the parties that the derrick as designed by Allison was intended to be used only for lifting and moving the main cables and was not designed for use in lifting and placing the wind boom cables. To say that the workmen's use of the derrick was a fortuitous event or accident is to ignore the plain and unambiguous language of the insurance policy. There are many negligent acts that one may conjecture this policy was intended to cover: loss that resulted from workmen rushing or hurrying to complete the job, slipping or falling while working, a minor alteration in the method of construction, etc." (T.R. 41)

The trial court's conclusion that the damage was not due to a fortuitous event or accident, or mere negligence on the part of the employees, but was instead a material alteration or change in the method of construction is correct and inescapable, based upon the Findings of Fact.

2. This Court has overlooked or erroneously interpreted the pertinent sections of the documents contained in Exhibit 1, which were submitted to Fireman's Fund before it issued the policy. The Court has stated that the exclusion clause of the policy refers to "the general design or method of construction embraced in the plans and specifications prepared by El Paso." (Opinion, page 5)

This Court has referred, however, to only one section of the afore-said plans and specifications in reaching its conclusion that a departure from the provisions of the subsequently prepared drawings and erection procedure plans did not constitute a material alteration or change in the general method of construction. The Court's opinion fails to take into account the following additional provisions of the documents contained in Exhibit 1, all of which were submitted to Fireman's Fund prior to issuance of the policy.

"Article 1. SCOPE OF THE WORK.

"The Contractor has agreed and does hereby agree to furnish all of the machinery, equipment, plant, tools, transportation, labor, superintendence, insurance, materials and all other requisites for constructing, complete in every detail, a Pipe Line Suspension Bridge across the Flaming Gorge Reservoir located in the State of Wyoming, approximately 12-Mi. Northwesterly from Dutch John, Utah, *in strict accordance with the plans and specifications as prepared by Matthews, Kenan & Edens, Consulting Engineers of San Antonio, Texas, acting as and in these contract documents titled the Engineers, and all other supplemental Specifications and Agreements*, and the Contractor shall do everything required by this agreement and the Contract Documents." (Exhibit 1, Contract Agreement Article 1., Appellee's Supplemental Memorandum, page 1, emphasis added)

\* \* \* \* \*

"Article 4 CONTRACT DOCUMENTS

"The Contract between the parties hereto shall consist of the following documents, each of which is attached hereto and made a part hereof the same as if copied herein:

1. Invitation to Bid
2. The Accepted Proposal
3. This Instrument
4. Performance Bond
5. The Specifications and *any changes and supplements applicable thereto.*
6. The Plans and *any additions, changes and drawings supplemental thereto.*"

Exhibit 1, Contract Agreement Article 4., Appellee's Supplemental Memorandum, page 2, emphasis added)

\* \* \* \* \*

I certify that in connection with the preparation of this petition, I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit, and that in my judgment the petition is well-founded and it is not interposed for delay.

PHILIP A. ROBBINS

*Attorney for Appellee*